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David L. Gregory

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THE PROBLEMATIC EMPLOYMENT DYNAMICS OF STUDENT INTERNSHIPS

DAVID L. GREGORY*

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I. INTRODUCTION

The front page of the *Wall Street Journal* on May 28, 1996, reported that nearly one quarter of all recent college graduates are willing to work temporarily for "free,"¹ in order to persuade employers through their diligence, competence, and hard work that they are worthy of consideration for subsequent compensated employment.² This is only one example of the pervasive anxiety felt throughout the world of work. There are also many displaced mid-career white collar managers and executives — terminated by the multi-millions throughout the past decade and a half of corporate "downsizing" — who are also willing to work for "free."³ These, perhaps more than any other vignette, highlight the issues surrounding the exploitation of "free labor." The army of student interns who offer free services for some indeterminate period in an effort to persuade prospective employers for opportunities for ultimately compensated employment poses very complex policy issues for the workplace. Monica Lewinsky, history's most prominent unpaid intern, may personify, as paradigm, the classic exploited unpaid white-collar intern within the classic complex political bureaucracy.

Academia seeks to follow the path of American industry. By increasing class size and teaching loads, university administrators demand greater productivity, turning teachers and teaching assistants into assembly line workers.⁴ Meanwhile, by using disposable term-contract employees — such as graduate assistants — universities deny these workers benefits, job security, and voice.⁵ Over the course of the past quarter century there has been a steady, inexorable increase in the percentage of part-time and fixed term college teachers and a corresponding sharp decrease in the percentage of newly tenured faculty.⁶ Where does this leave graduate teaching assistants who hope to become college professors? Surely, the overproduction of Ph.D's has

1. See Paulette Thomas, *Special News Report about Life on the Job and Trends Taking Shape There*, WALL ST. J., May 28, 1996, at A1.

2. See *id.*

3. For extensive citation of authorities regarding the stratified workplace and economy, see David L. Gregory, *Dorothy Day's Lessons For The Transformation of Work*, 14 HOFSTRA LAB. L.J. 57, 132 n.517 (1996).

4. See CARY NELSON, MANIFESTO OF A TENURED RADICAL 154 (1997).

5. See *id.*

6. See *id.* For other excellent recent scholarship on the plight of workers in higher education, see JOHN HOERR, WE CAN'T EAT PRESTIGE: THE WOMEN WHO ORGANIZED HARVARD (1997) (describing successful unionization initiative of Harvard University clerical and technical workers); WILL TEACH FOR FOOD: ACADEMIC LABOR IN CRISIS (Cary Nelson, ed., 1997).

made academia vulnerable.⁷ If there are fewer numbers of graduate students, it would be more difficult for their university employers to treat them like unskilled workers. If graduate students are to ameliorate exploitative situations, they must realize the power in their numbers and must become a "constituency to be reckoned with."⁸

This article will survey these situations and will offer some realistic means by which law can at least seek to minimize, if not entirely eradicate — to brake, if not to break — the exploitation of labor.

The exploitation of labor is both global and highly localized in its virtually infinite dimensions. Rather than analyze the most flagrant, egregious abuses of workers, such as prison, slave, or child sweatshop labor, this article will critique the contemporary exploitation of labor through the applied prism of a considerably more subtle and nuanced dimension of potentially exploited labor — the student intern — concentrated primarily in white-collar, professional sectors of the United States economy. Unlike the more blatant forms of labor exploitation, student intern labor is a more subtle, but perhaps equally persuasive, manifestation of the contemporary exploitation of labor in capitalist political economy today.

The article will first review the employee/independent contractor distinction and the related issues of contingent employee "leasing."⁹ Next, the article will examine the reemergence of the "living wage" initiative and the complex practical dynamics and

7. See NELSON, *supra* note 4, at 154.

8. *Id.* at 166.

9. For an excellent overview of case law and various statutory and treatise criteria regarding employer-employee and independent contractor relationships, see Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, *passim*; see also Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-first Century*, 12 LAB. LAW. 165 (1996); Lewis L. Malthy & David C. Yamada, *Beyond "Economic Realities": The Case For Amending Federal Employment Discrimination Laws To Include Independent Contractors*, 38 B.C. L. REV. 239 (1997); Claudia MacLachlan, *IRS Struggles To Define 'Independent Contractor'*, NAT'L L.J., Sept. 16, 1996, at B1. The National Labor Relations Board is currently reconsidering the common law right-of-control test to determine whether a worker is an independent contractor. See *NLRB Ponders Test For Independent Contractors*, 153 Lab. Rel. Rep. (BNA) 461 (Dec. 9, 1996). Recently, both the Second and Sixth Circuits found that even partners dismissed by major firms are "employees" for Title VII employment discrimination law purposes. See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996). But see *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996) (dismissing argument of paralegal fired by law firm that all attorneys were employees of the firm for Title VII

purposes). See also Chris Klein, *Partner May Be Judged 'Employee'*, NAT'L L.J., Dec. 23, 1996, at B1.

In *EEOC v. Fawn Vendors, Inc.*, 965 F. Supp. 909 (S.D. Tex. 1996), the court held that because the employer, in the business of selling vending machines, had the right to control the details and manner of the salesperson's work performance, the worker was deemed an employee and not an independent contractor. See *id.* at 913. The court determined this despite the fact that the salesperson had signed a document describing her as an independent agent, was paid on a commission-only basis, and did not have taxes withheld from paychecks. See *id.* at 911-13. Because the worker was an employee and not an independent contractor, her Title VII lawsuit for unlawful employment discrimination could proceed against the employer. See *id.* at 913.

Of course, the double edge of the sword is that the injured independent contractor worker, unlike the statutory employee, may sue in tort, whereas the injured employee is usually limited to recovery pursuant to the workers' compensation statute. Temporary workers are often regarded as independent contractors — as "contract" workers — who work for the temporary service agency provider. Thus, the temporary service agency provider is regarded as the employer, and is subject to the employer provisions of the workers' compensation statute. See, e.g., *Goodman v. Sioux Steel Co.*, 475 N.W.2d 563 (S.D. 1991). On December 3, 1996, the National Labor Relations Board heard argument in cases regarding whether temporary workers wishing to unionize still need the joint consent of the temporary employment agency and the permanent employer. See *NLRB to Decide if Temporary Workers Can Join Unions*, WEST'S LEGAL NEWS, Dec. 4, 1996, available in 1996 WL 690699. The Board is also examining independent contractor issues in two cases involving delivery drivers. See *Roadway Package Sys., Inc.*, Nos. 31-RC-7267 & 31-RC-7277 (N.L.R.B. argued Dec. 3, 1996); *Dial-A-Mattress Operating Corp.*, No. 29-RC-8442 (same).

By all accounts, there is a burgeoning contingent work force — and a corresponding popular and academic literature regarding temporary workers. Some estimate that "at least five million Americans will draw a paycheck from a temp firm this year, add that to the 22 to 23 million other contingent workers, and it starts to approach a quarter of the entire workforce." Thomas Goetz, *Look For The Union Label: In the Effort to Organize Temp Workers, Business Doesn't See The Benefits*, VILLAGE VOICE, Jan. 21, 1997, at 38; see *Development in the Law—Employment Discrimination*, 109 HARV. L. REV. 1647 (1996); Mark H. Grunewalt, *The Regulatory Future of Contingent Employment: An Introduction*, 52 WASH. & LEE L. REV. 725 (1995); Deborah Maranville, *New Approaches to Poverty Law, Teaching, and Practice: Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291 (1995); Jennifer Middleton, *Contingent Workers In A Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557 (1996); Barnaby J. Feder, *Bigger Roles for Suppliers of Temporary Workers*, N.Y. TIMES, Apr. 1, 1995, at A3; Kerry Hannon, *The Tempting Life of a Professional Temp*, U.S. NEWS & WORLD REP., Oct. 28, 1996, at 80; Peter T. Kilborn, *In New Work World, Employers Call All The Shots*, N.Y. TIMES, July 3, 1995, at A3 ("Of 124 million people who were working in May, 8 million — 2.2 million more than a decade ago — moonlighted, or held two or more jobs simultaneously. Of 22 million part-timers, 4.5 million wanted full time work and could not get it And the average hourly wage, in terms of what people can buy with it, has been falling since 1973."). Manpower, Inc., an employee temporary placement service, is now a larger job source than the General Motors Corporation. See WILLIAM BRIDGES, *JOB SHIFT: HOW TO PROSPER IN A*

WORKPLACE WITHOUT JOBS 5 (1994). Toyota Motor Corporation recently created a new employment category, comprised entirely of temporary professional workers on one-year contracts, with compensation determined by their individual contributions, rather than via standard salaries. See *id.*

Many temporary and/or part-time workers are involuntarily underemployed. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'TS OF LABOR & COMMERCE, FACT-FINDING REPORT. 21 (1994) [hereinafter FACT-FINDING REPORT]; see also Lance Morrow, *The Temping Of America*, TIME, Mar. 29, 1993 at 40, 41 ("America has entered the age of the contingent or temporary worker, of the consultant and subcontractor, of the just-in-time work force-fluid, flexible, disposable. This is the future. For good and ill, the workers of the future will constantly have to sell their skills, invent new relationships with employers who must, themselves, change and adopt constantly in order to survive in a ruthless global market."). The hard, available data on the precise dimensions of the contingent work force is elusive; it is certainly evolving rapidly. See H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683, 696 (1994) (explaining that 10,947 consistent or leased employees were utilized in 98 companies in 1984; 1.6 million such employees were utilized in 2,178 companies in 1993).

In January, 1995, the Dunlop Commission of the U.S. Departments of Labor and Commerce stated that employers often "create contingent relationships not for the sake of flexibility or efficiency but in order to evade . . . legal obligation." COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'TS OF LABOR & COMMERCE, REPORT AND RECOMMENDATIONS 45 (1994) [hereinafter REPORT AND RECOMMENDATIONS]. The Commission further summarized: "[C]ontingent arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises some serious social issues. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce. They often receive less pay and benefits than traditional full-time or "permanent" workers, and they are less likely to benefit from the protections of labor and employment laws. A large percentage of workers who hold part-time or temporary positions do so involuntarily." *Id.* at 35. See also Lesley Alderman, *How you can take control of your own career*, MONEY, July 1, 1995, at 37, 40 ("Since 1991, a staggering one out of every seven of the 7.5 million jobs created in the country has been a temporary position."); Robert D. Hershey, Jr., *Survey Finds 6 Million, Fewer Than Thought, in Temporary Jobs*, N.Y. TIMES, Aug. 19, 1995, at A2 ("Six million Americans hold jobs they do not consider permanent, fewer than experts expected, the first Government survey of its kind has found. Some estimates have placed the share of contingent workers, who are not necessarily part-time employees, as high as 35 percent instead of the 4.9 percent found by the Bureau of Labor Statistics. Time [Magazine], for example, estimated in a prominent 1993 article entitled 'The Temping of America' that contingent workers would make up half of the labor force by the year 2000."). These trends have been underway for more than a decade. See BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* (1982); see also David L. Gregory, *Company Closing And Community Consequences*, 72 U. DET. MERCY L. REV. 1 (1994); D. Bruce Shine, *Can The NLRB Help Cinderella and Little Orphan Annie?*, 47 LAB. L.J. 693 (1996); Jeffrey L. Hiday, *Temporary Workers Receive Higher Pay*, WALL ST. J., Nov. 8, 1996, at B5. It is an international

moral dimensions surrounding student internships. Finally, the article will survey some recent social initiatives to address child labor; these may be broad analogues to appreciate what little has thus far been done to meliorate the predicament of exploited workers.

Student interns, aspiring to join the diminishing ranks of the elite, are increasingly subject to exploitation and ultimate disappointment. Whether those student interns who "succeed" will be sensitized by their intern experiences and made more empathetic or more cynical may shape the perception, and the reality, of corporate employers toward workers well into the next century.

II. THE WORK RELATIONSHIP: EMPLOYEE OR INDEPENDENT CONTRACTOR?

There are many approaches to determine whether a worker is an "employee" or an "independent contractor."¹⁰ Labor and employment law generally presumes that the worker is in an employee-employer relationship. The classification of a worker as an employee or independent contractor can have important tax consequences on both parties.¹¹ If the worker is an independent contractor, the employer does not have the same range of statutory obligations.¹²

problem. See John Templeman et. al., *A Continent Swarming With Temps*, BUS. WK., Apr. 8, 1996, at 22 (reporting that one of every five jobs in France is filled by temporary workers and that temporary workers were growing 35% in Germany in 1996.); see also Grunewald, *supra*, at 725 ("[Contingent employment] is generally understood to include part-time, temporary, seasonal, casual, contract, on-call, and leased employees."); REPORT AND RECOMMENDATIONS, *supra*, at 35-36 (reporting that many temporary and/or part-time workers are involuntarily underemployed, and that in 1992, 6.5 million of 20.6 million part-time workers were involuntarily relegated to part-time work); Amy Saltzman, *You, Inc.*, U.S. NEWS & WORLD REP., Oct. 28, 1996, at 66; Templeman et al., *supra* at 54 (determining that the movement toward a contingent workforce is an international problem).

10. See Carlson, *supra* note 1, at 664.

11. The employer must withhold federal and state income tax from the employee's wages, see I.R.C. § 3401 (1994), pay federal and state payroll taxes, see Federal Unemployment Tax Act, I.R.C. § 3306 (1994), withhold FICA tax from wages, see Federal Insurance Contributions Act, I.R.C. § 3102(a) (1994), and report the employee's wages to the IRS and to the employee.

12. The employer must submit an IRS Form 1099 for each worker to whom it pays more than \$600 per year, see I.R.C. §6041A(a) (1994), while the worker is responsible for declaring federal and state taxes on amounts received from the employer, and for federal self-employment tax.

A. Common Law Tests

The traditional agency law criterion, the master/servant relationship, is often used as a starting point in determining if a worker is an employee or independent contractor. The *Restatement (Second) of Agency* test is:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the [worker] supplies the instrumentalities tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant;
 - (j) whether the principal is or is not in business.¹³

B. Case Precedent

In *Community for Creative Non-Violence v. Reid*,¹⁴ the United States Supreme Court in 1989 used the common law test to determine if a worker was an "employee." From the amalgam of variables set forth in the *Restatement (Second) of Agency*, the salient

13. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

14. 490 U.S. 730 (1989). For commentary, see Elizabeth Flagg, *Insurance Agents Slip Through the "Good Hands" of ERISA: "Employee" Defined by Agency Principles in Nationwide Mutual Insurance Company v. Darden*, 28 WAKE FOREST L. REV. 1099, 1110 (1993).

factors are the extent of supervisory "control" over the worker and the work; the greater the degree of "control," the more likely the worker is an employee rather than an independent contractor.¹⁵

In *Nationwide Mutual Insurance Co. v. Darden*¹⁶ in 1992, the United States Supreme Court again wrestled with defining the term "employee."¹⁷ The Supreme Court adopted the common-law definition, as it did earlier in *Reid*. The Court's prevailing test for employer-employee set forth the following factors:

[We] consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring

15. Under the Copyright Act of 1976, 17 U.S.C. §§ 101-1101 (1994), the person who "translates an idea into a fixed, tangible expression" is entitled to copyright protection, with an exception that, when the work is made for hire, the employer retains ownership. See 17 U.S.C. § 102. According to the Act, if the work is "made for hire," the employer is the author unless there is a written agreement to the contrary. See *id.* § 201(b). The Court in *Reid* determined that the Copyright Act of 1967 provided two avenues for works to acquire "work for hire" status, one for employees and one for independent contractors. See *Reid*, 490 U.S. at 742-43. The Act, however, does not define the term "employee." The Court concluded that Congress intended the master/servant relationship of common-law agency doctrine. See *id.* at 743. Applying these factors, the Court concluded that *Reid* was an independent contractor, and not an employee. See *id.* at 752. Thus, as the independent sculptor, he retained rights to the sculpture. See *id.* at 752-53.

16. 503 U.S. 318 (1992). For commentary, see Flagg, *supra* note 14, *passim*.

17. The Court determined that while Darden, an insurance salesman, would probably not qualify as an employee under traditional tests, it found the traditional definition inconsistent with the declared policies and purposes of ERISA. See *Darden*, 503 U.S. at 327-28. The court of appeals held that an ERISA plaintiff can qualify as an employee by showing that he had a reasonable expectation that he would receive benefits, that he relied on this reasonable expectation, and that he lacked the economic bargaining power to contract out of the benefit plan forfeiture provisions. See *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 706-07 (4th Cir. 1986). The court of appeals reasoned that the term "employee" should be interpreted "in the light of the mischief to be corrected and the end to be attained." *Id.* at 706 (quoting *United States v. Silk*, 331 U.S. 704, 713).

party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹⁸

C. Contingent and "Leased" Workers

Many employers strategically endeavor to reduce the permanent, full time core of employees, supplemented, as business demand warrants, by a larger, flexible pool of ad hoc, contingent, part-time, temporary, independent contractor workers without pensions or fringe benefits. For example, an employer may give certain workers the same responsibilities as their "regular employees," yet deny these so called contingent workers company benefits.¹⁹

Within the world of intellectual work, perhaps more workers are increasingly analogous to the independent sculptor and roving salesperson of *Reid* and *Darden*, even "leased" truck drivers. In *Rheem Manufacturing Co. v. Central States Southeast and Southwest Areas Pension Fund*,²⁰ the court, counter to the prevailing, conventional view, found that a trucking company that used leased employees was not an "employer" for purposes of pension law.²¹

18. *Darden*, 503 U.S. at 323-24 (quoting *Reid*, 490 U.S. at 751-52).

19. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996). The Microsoft corporation employs a permanent staff of "regular employees" who receive benefits including a savings plan which defines eligibility to "any common-law employee who receives remuneration for personal services rendered to the employer and who is on the United States payroll of the employer." *Id.* at 1192. Microsoft employed over 1,000 workers it classified as "freelancers" or "independent contractors" who did not receive any benefits, yet who worked continuously for the company for over two years performing identical functions as "core" employees. *See id.* at 1189-90.

The Internal Revenue Service applied the common-law agency test and concluded that because "Microsoft either exercised, or retained the right to exercise, direction over the services performed," they were employees of Microsoft for tax purposes, and not independent contractors. *Id.* at 1190 n.2. It was then certified that plaintiffs were common law employees. *See id.* at 1191. For additional commentary on the case, see David L. Gregory & William T. Leder, *Employee or Independent Contractor?*: *Vizcaino v. Microsoft Corp.*, 47 LAB. L.J. 749 (1996).

20. 63 F.3d 703 (8th Cir. 1995).

21. *See id.* at 706. In July 1965, Rheem Manufacturing Company, a manufacturer of heating and air conditioning equipment, entered into a lease agreement with Knight Associates for fifteen of Knight's truck drivers. *See id.* at 704. The terms of the agreement stated that Knight would provide the truck drivers to Rheem, and Rheem would pay Knight for the total number of drivers and miles driven weekly. *See id.* at 704-05. Knight had a collective bargaining agreement with the Teamsters Union and its Central States Southeast and Southwest Areas Pension Fund. *See id.* at 705. Pursuant to the agreement with Rheem, the drivers would continue to be Knight's employees and Knight would

In the wake of *Reid* and *Darden*, therefore, the underlying conceptual shifts are as profound as the daily, practical changes in the nature of the workplace.²² As these issues develop in new areas, courts will either apply new criteria or continue to use prior rationale in determining whether an individual is an employee.²³ If the skepticism with which the law previously regarded the repudiation of the employer-employee relationship steadily dissipates, the panoply of statutory protections the legal regime affords employees will become correspondingly moot. The "independence" of the independent contractor and the

pay the drivers' wages and provide all of the drivers' benefits required by the collective bargaining agreement with the Teamsters Union. *See id.*

When Rheem terminated the agreement, Knight ceased payment of its contributions to Central States. The court reasoned that the appropriate inquiry under the Multi-Employer Pension Plan Amendments Act (MPPAA) was "whether the alleged employer had an obligation to contribute and what was the nature of that obligation." *Id.* at 706 (quoting *Seaway Port Auth. v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503, 508 (8th Cir. 1990)). The court held that the nature of the obligation establishing an "employer" for MPPAA purposes is contractual, and that "the party who is signatory to a contract creating the obligation to contribute is the 'employer' for purposes of establishing withdrawal liability." *Id.* at 707 (footnote omitted). Therefore, Knight, and not Rheem, was contractually bound to make pension contributions to the Central States Pension Fund. *See id.*

22. A new arena for debate is the emerging workplace of the welfare recipient who must now enter workfare. The welfare poor are now compelled to work in order to maintain benefits for a capped and finite period, placing tremendous downward wage and job security pressures on public sector workers. The new workers, given no benefits other than Medicaid, effectively earn less than the federal minimum wage. Since the welfare recipients are not public sector employees, but instead are legally considered only welfare program participants, they are not protected by the federal labor laws. The tests applied in determining whether workfare participants are employees are many. For example, in *Bruckman v. Giuliani*, 662 N.Y.S.2d 914 (N.Y. Sup. Ct. 1997), the New York state trial court compared the activity performed by a workfare participant and that done by a City employee to determine employment status. *See id.* at 918. The court held that workfare participants were entitled to wages comparable to the wages on city employees who performed substantially similar work. *See id.* at 919-20. On the other hand, in *Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995), the federal court held that workfare participants were not employees under the Fair Labor Standards Act by evaluating the overall relationship between the parties. *See id.* at 1557-58. The court reasoned that the work done by workfare participants is only one requirement of the assistance program. *See id.* at 1558.

23. For example, in *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996), the court looked at an "employer's ability to control job performance and employment opportunities of the aggrieved individual" in determining whether the plaintiff was a partner or an employee. *Id.* at 442. The court held that the plaintiff was not a partner but only an employee since he was limited to his position and under the control of management. *See id.* at 444.

"leased" contingent worker will be more often than not an isolating, illusory, atomized, and hollow autonomy.

III. THE RENAISSANCE OF THE "LIVING WAGE" INITIATIVE

The minimum wage of 1968, adjusted for inflation, would be \$7.20 today.²⁴ The number of people not earning a living wage is increasing dramatically, and the minimum wage has fallen significantly below the amount needed to live above poverty. Some local governments have decided to mandate a "living wage" be paid by those presuming to do business with government.

A. Catholic Social Teaching and The Living Wage

The "living wage" principle is rooted in Catholic social teaching regarding the rights of workers.²⁵ Within the domestic

24. See Paul Winslow, *Missouri Must Raise the Minimum Wage*, ST. LOUIS POST-DISPATCH, Aug. 21, 1996, at 6B.

25. See POPE LEO XIII, *RERUM NOVARUM* (1891) [hereinafter *RERUM NOVARUM*]; POPE PIUS XI, *QUADRAGESIMO ANNO* (1931) [hereinafter *QUADRAGESIMO ANNO*]; POPE PIUS XII, *SERTUM LAETITIAE* (1939) [hereinafter *SERTUM LAETITIAE*]; POPE JOHN XXIII, *MATER ET MAGISTRA* (1961) [hereinafter *MATER ET MAGISTRA*]; SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* (1965) [hereinafter *GAUDIUM ET SPES*]; POPE PAUL VI, *POPULORUM PROGRESSIO* (1967) [hereinafter *POPULORUM PROGRESSIO*]; POPE PAUL VI, *OCTOGESIMA ADVENIENS* (1971) [hereinafter *OCTOGESIMA ADVENIENS*]; POPE JOHN PAUL II, *LABOREM EXERCENS* (1981) [hereinafter *LABOREM EXERCENS*]; POPE JOHN PAUL II, *SOLLICITUDO REI SOCIALIS* (1987) [hereinafter *SOLLICITUDO REI SOCIALIS*]; POPE JOHN PAUL II, *CENTESIMUS ANNUS* (1991) [hereinafter *CENTESIMUS ANNUS*]; see also GREGORY BAUM, *THE PRIORITY OF LABOR: A COMMENTARY ON LABOREM EXERCENS*; ENCYCLICAL LETTER OF POPE JOHN PAUL II (1982); CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE (David J. O'Brien & Thomas A. Shannon eds., 1992); CO-CREATION AND CAPITALISM: JOHN PAUL II'S *LABOREM EXERCENS* (John W. Houck & Oliver F. Williams eds., 1983); GEORGE G. HIGGINS & WILLIAM BOLE, *ORGANIZED LABOR AND THE CHURCH: REFLECTIONS OF A "LABOR PRIEST"* (1993). Catholic social teaching is an evolving body of ecclesiastical documents and a rich tradition of particular, heterogeneous applications. Pope John Paul II was a powerful champion of the Solidarity movement, a labor union political initiative which brought down the Communist government of Poland. The Canadian and United States Bishops also have been eloquent spokespersons for the rights of workers. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL* (1986) [hereinafter *ECONOMIC JUSTICE FOR ALL*]; NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *CATHOLIC FRAMEWORK FOR ECONOMIC LIFE* (1996) [hereinafter *CATHOLIC FRAMEWORK FOR ECONOMIC LIFE*]. The most influential early work on Catholic social teaching on labor in the United States was that of Monsignor John A. Ryan, one of Monsignor George Higgins' intellectual mentors at the Catholic University of America. See JOHN A. RYAN, *A LIVING WAGE: ITS ETHICAL AND ECONOMIC ASPECTS* (1906); JOHN A. RYAN, *DISTRIBUTIVE JUSTICE* (3d ed. 1942). I extensively discuss Catholic social teaching on labor in David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1987), David L. Gregory,

economy, the United States Bishops applied these universal theories: "the Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions;"²⁶ "all people have the right to economic initiative, to productive work, to just wages and benefits, to decent working conditions as well as to organize and join unions or other associations."²⁷ It is unjust to force employees to accept employment at less than subsistence compensation, the even less palatable "alternative" being foregoing the benefits of working at all.²⁸ Business may not prosper at the expense of human dignity.²⁹ Justice dictates that workers must be paid "a wage which allows them to live a truly human life and to fulfill their obligations in a worthy manner."³⁰

Most recently, Pope John Paul II reiterated these moral principles in *Centesimus Annus*, his 1991 encyclical criticizing materialism:

Profit is a regulator of the life of a business, but it is not the only one; *other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business.³¹

Monsignor John Augustine Ryan believed that wages paid to the head of the household should be sufficient for every member of a family to perfect his or her rational nature;³² such wages were essential for individual self-development.³³ Ryan's beliefs were based on his formula for individual rights: "that every individual has a right to all things that are essential to the reasonable

Dorothy Day's Lessons for the Transformation of Work, 14 HOFSTRA LAB. L.J. 57 (1996), David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135 (1988) and David L. Gregory & Charles J. Russo, *Overcoming N.L.R.B. v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 LAB. L.J. 55 (1990). Catholic social teaching on the rights of workers became popularized in the Academy-Award winning film, *ON THE WATERFRONT* (Columbia Pictures Corp. 1953), inspired by Jesuit priest John "Pete" Corridan's work against labor racketeering on the New York City shipping docks. The Nobel Peace Prize for 1996 was awarded to Catholic Bishop Carlos Belí, the apostolic administrator of Dili, the Capital of East Timor, for his social justice advocacy for the persecuted populations of Indonesia.

26. ECONOMIC JUSTICE FOR ALL, *supra* note 25, at para. 104.

27. CATHOLIC FRAMEWORK FOR ECONOMIC LIFE, *supra* note 25, at para. 5.

28. See RERUM NOVARUM, *supra* note 25, at paras. 43-45.

29. See QUADRAGESIMO ANNO, *supra* note 25, at para. 83.

30. MATER ET MAGISTRA, *supra* note 25, at para. 71.

31. CENTESIMUS ANNUS, *supra* note 25, at para. 35.

32. See Harlan R. Beckley, *Love, Human Dignity, and Justice: Some Legacies from Protestant and Catholic Ethics*, 66 NOTRE DAME L. REV. 1053, 1063 (1991).

33. See *id.*

development of his personality.”³⁴ Ryan, a New Deal champion, favored the passage of the Fair Labor and Standards Act establishing the federal minimum wage.³⁵ The legislative history of the FLSA indicates that a primary purpose of the minimum wage law was to provide a living wage.³⁶ Reports to Congress supported the goal of the minimum wage as a living wage; the purpose for the minimum wage was to establish a wage floor, a floor adequate to support life with human dignity, a just wage in return for a day’s work.³⁷ Living wage initiatives reforms are necessary for those who are called contingent workers.

B. *New York City and Other Living Wage Legislation*

The New York City Council overrode Mayor Giuliani’s veto on September 11, 1996, of the “Prevailing Wage” bill.³⁸ The bill requires that unarmed security guards receive \$7.25 an hour, food service workers receive \$9.00 an hour, temporary workers receive \$11.25 an hour and janitors receive \$14.00 an hour,³⁹ when their private employers have contracts to perform business services for New York City. In April, 1997, the Los Angeles City Council voted to override Mayor Richard Riordan’s veto of the living wage ordinance requiring all city contractors and firms receiving city subsidies to pay at least \$7.50 an hour to their 7,500 affected employees, plus medical coverage, or an extra \$1.25 an hour to allow the employee to get medical coverage.⁴⁰

In Massachusetts, the legislature overrode the governor’s veto, and now requires a minimum wage of \$5.25.⁴¹ A coalition of community and labor activists in Boston called for a living wage of \$7.50 an hour, to be paid by any contractor with the city that enjoys significant municipal tax breaks or holds contracts with the city of \$10,000 or more.⁴² Citizen initiative campaigns have been launched to raise the minimum wage in Houston to

34. *Id.* at 1062 n.37.

35. *See id.* at 1064-65.

36. *See* William P. Quigley, ‘A Fair Day’s Pay for a Fair Day’s Work’: *Time to Raise and Index the Minimum Wage*, 27 ST. MARY’S L.J. 513, 529 (1996).

37. *See id.* at 530.

38. *See* Vivian S. Toy, *Giuliani Vetoes a Bill to Make City Contractors Raise Wages*, N.Y. TIMES, Aug. 8, 1996, at B2.

39. *See id.*

40. *See id.*; *see also* Matthew Miller, *Wages Of Politics*, NEW REPUBLIC, Feb. 10, 1997, at 12.

41. *See* Jane Slaughter, *Working for a Living Wage*, PROGRESSIVE, Apr. 1996, at 16, 16.

42. *See* Ted Bunker, *Activists Call for a Living Wage*, BOSTON HERALD, Sept. 3, 1996, at 20.

\$6.50, in New Orleans to \$6.00, and in Denver from \$6.50 in 1997 to \$7.15 in 1999.⁴³

In Wisconsin, the Milwaukee City Council passed a living wage ordinance to pay employees of city contractors a minimum wage of \$6.05 an hour.⁴⁴ In Madison, Wisconsin, a pending living wage ordinance would raise the minimum wage to \$7.70 an hour, the amount that could support a family of four in Dane County, Wisconsin.⁴⁵ The "living wage" momentum, enacted thus far in some municipalities, is one modest, but effective device against the exploitation of labor. Unfortunately, it is virtually impossible to expect the living wage principle to be expanded voluntarily directly into private sector employment.

IV. THE EXPLOITATION OF STUDENT INTERNS

Student interns, the employment candidates closest to the elite white-collar professional class, are also caught in these tectonic shifts. The dynamics presented by the proliferation of student interns are, in many ways, the most complex and subtle of any now underway in the economy: the reality of workers pressured to work with little or no compensation in the hope of bolstering skills and credentialed experience sufficiently eventually to obtain, full-time compensated employment.

Approximately one-third of college students are summer interns.⁴⁶ Between 1990 and 1995, there was a thirty-seven percent increase in the total number of 40,000 student internships offered nationwide, with a thirty percent increase since 1993; about half of these internships are unpaid.⁴⁷ While they have

43. See Neal Peirce, *Minimum Wage Push: Cities, States, Not Waiting for the Feds*, NATION'S CITIES WKLY., June 17, 1996, at 7. In Missouri, a proposal to increase the minimum wage from \$4.25 to \$6.75 by 1999 garnered enough citizen signatures to appear on the November 5, 1996 ballot. See Jonathan Kerr, *Missouri: Minimum Wage, Parks Tax Head Ballot Issues*, WEST'S LEGAL NEWS, Sept. 13, 1996, available in 1996 WL 516216. Chicago is also considering enactment of an ordinance that would require businesses that have contracts with the City or that use the City's economic development programs, to pay employees at least \$7.60 an hour, or \$15,800 a year for a full-time worker. See Sabrina L. Miller, *Studies on 'Living Wage' Impact Give Both Sides of the Picture*, CHI. TRIB., June 23, 1996, at 3.

44. See Vikki Ortiz & Gail Perry-Daniels, *Living Wage Effort Gets Push at Town Hall Parley Here*, CAP. TIMES (Milwaukee, Wis.), Oct. 4, 1996, at 1A.

45. See *id.*

46. See Shawn Hubler, *Summer Interns: Prepping for Real Life with Career Opportunities at Stake, Students Aren't Deterred by Low Pay and Menial Work*, L.A. TIMES, July 8, 1996, at A1.

47. See Thomas Goetz, *To Serve Them All My Days: Are Internships Education or Exploitation?*, VILLAGE VOICE, Jan. 17, 1995, at 6.

existed for generations, especially in engineering programs, they have proliferated among almost all college majors in the 1990s.

Unpaid internships are coveted by college students trying to obtain work experience to distinguish themselves ultimately in the market from the more than one million annual college graduates.⁴⁸ A Northwestern University study found that twenty-six percent of all 1993 college graduates hired had previously worked as interns, compared to only nine percent of 1992 graduates.⁴⁹ About one quarter of college graduates entering the job market throughout the next decade are expected to settle for jobs that do not require a college degree.⁵⁰ In an attempt to prove their ability, twenty four percent of 1996 college graduates, twice as many as in 1995, are willing to work temporarily for free.⁵¹

An internship can be a valuable experience for a student. An ideal internship should provide an intern with real work experience, a personal mentor, and networking opportunities.⁵² The internship also gives the intern an opportunity to "audition" for the prospective employer, and to receive academic credit. If the intern performs well, the internship holds the seductive possibility of a permanent compensated position. While occasionally this comes to fruition, often it does not. Meanwhile, the employer has the advantage of free labor, a situation that is inherently exploitative.

Internships benefit employers in a myriad of ways; they provide free labor, fresh perspectives, and a means to screen potential employees.⁵³ The cost of hiring, as a permanent employee, a former intern is roughly one-third the cost of recruiting and training a new employee with no prior experience with the particular employer;⁵⁴ employers "really prefer to hire a student who has experience in their field through an internship or something

48. See Eric Lai, *Competition for Internships Intensifies as Students and Career Changers Covet the Experience, which can be the Key to Landing a Job*, ORANGE COUNTY REG. (Cal.), Sept. 4, 1995, at D6; Donald T. O'Connor, *The Price of Free Labor*, A.B.A. J., Jan. 1997, at 78, 78.

49. See Goetz, *supra* note 47, at 6; Kirk Johnson, *In The Changed Landscape of Recruiting, Academic and Corporate Worlds Merge*, N.Y. TIMES, Dec. 4, 1996, at B13.

50. See Wendy Bounds, *All Work and no Pay: Internships Promise Long Hours, No Money and Menial Work*, WALL ST. J., Feb. 27, 1995, at R7.

51. See Thomas, *supra* note 2, at A1.

52. See Lai, *supra* note 48, at D6.

53. See Michael Croan, *They Aren't Paid, but Interns' Experience Will Pay Off*, Roanoke Times & World News (Va.), Aug. 12, 1996, at C1.

54. See Hubler, *supra* note 46, at A1.

similar, rather than a student without any experience."⁵⁵ If an employer expects to hire an intern as an employee after graduation, the firm knows that it can benefit by teaching the intern processes that may be unique to the enterprise.⁵⁶

While there can be many positive attributes to paid student internships, they are rife with exploitation. This exploitation potential, especially in the era of corporate downsizing, has been explicitly recognized. "With pervasive downsizing companies feel they need to do more with less, and internships are a low-cost way to preview candidates before they hire them," said Mark Oldman, co-author of two annual guides, *America's Top Internships* and *The Internship Bible*.⁵⁷ Many employers retain unpaid interns rather than hiring salaried workers.⁵⁸ Some employers regard unpaid interns as means to reduce, if not to avoid altogether, labor costs. Various employers, rather than placing a student intern in a meaningful position, place the intern into meaningless "grunt" work, to fetch coffee and make copies. Hours can be long; for about half, there are no wages.⁵⁹ Student interns who routinely work fifty to sixty hours each week without pay would be entitled to overtime premium rate pay if they were properly compensated employees.⁶⁰

Some professions are especially notorious for exploiting unpaid student interns: publishing, architecture,⁶¹ theater arts, and fine arts.⁶² One student intern at a television station stated, "this is a one year internship, and you learn everything in less than one month. Then for the other eleven months, you are doing a job you should be paid for."⁶³ At the United Nations, six months must pass before the intern can apply for a job.⁶⁴

Exploitation of unpaid student interns may have immediate, adverse, legal ramifications. Unpaid student internships may be

55. Croan, *supra* note 53, at C1.

56. See Bob Vogel, *Companies Take Advantage of Cheap Labor from Interns*, ORLANDO BUS. J., Sept. 15, 1995, at 31, 31.

57. Johnson, *supra* note 49, at B13.

58. See Joan E. Rigdon, *Workplace: For Companies Facing Rough Sailing, Student Interns Provide Cheap Labor*, WALL ST. J., Apr. 25, 1991, at B1.

59. See Harvey Mackay, *Interning Can Be a Vicious and Exploitative Arrangement*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Sept. 7, 1994, at 2D.

60. See *id.*

61. See Thomas Fisher, *The Intern Trap: How the Profession Exploits Its Young*, 75 PROGRESSIVE ARCHITECTURE, July, 1994, at 69, 69.

62. See Mackay, *supra* note 59, at 2D.

63. Lou Prato, *Internships: Invaluable Experience or Slave Labor*, ELECTRONIC MEDIA, Aug. 19, 1996, at 1, 1.

64. See Goetz, *supra* note 47, at 6.

employer violations of the federal Fair Labor Standards Act of 1938, regulating minimum wage and overtime compensation.

The Wage and Hour Division of the United States Department of Labor effectuates the federal Fair Labor Standards Act of 1938. The FLSA applies to companies engaged in interstate commerce with at least two employees and \$500,000 in annual sales.⁶⁵ Most student interns are, in fact, entitled to the minimum wage.⁶⁶ In order to be exempt from the FLSA, the employer must demonstrate that the employer did not obtain any "immediate advantage" from the work of the interns; only in that instance can the interns be considered as non-employees and thus not subject to the FLSA.⁶⁷ The FLSA requires that employees within the meaning of the Act be paid the minimum wage, with the premium rate of time and one half for all time worked beyond forty hours per week.⁶⁸ The Act exempts executives, administrators, and professionals, with some flexibility for apprentices and students.⁶⁹

The regulatory regime's minimum wage problem begins with defining the parameters of the exempt and flexible categories of employees. The FLSA defines a "professional" as a person who works without supervision and consistently uses independent judgment, obviously not true of an intern.⁷⁰ Firms may also try to get an FLSA exemption under the apprentice, learner, or student learner categories.⁷¹ An "apprentice" is defined as a worker employed to learn a skilled trade.⁷² Professional and semi-professional occupations are not considered skilled trades. Somewhat incongruously, but fortuitously, the intern cannot be deemed a student "learner" as federal regulations dictate that all applications for the employment of learners in office occupations be denied.⁷³ Finally, a "student learner" is one who is

65. See 29 U.S.C. § 203(s) (1994).

66. See James J. McDonald Jr., *Shop Talk: Education Versus Exploitation*, L.A. TIMES, Sept. 1, 1996, at D1.

67. WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK § 106.11 (1990).

68. See 29 U.S.C. § 207(a)(1) (1994); see also Fisher, *supra* note 61, at 70.

69. See 29 U.S.C. 213(a)(1) (1994).

70. For representative decisions finding that trainees may not be employees within the meaning of the FLSA, see *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993) (holding firefighters not employees within the meaning of the Act) and *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982) (holding that trainee flight attendants are not employees within the meaning of the Act).

71. See 29 C.F.R. §§520.1, 521.1, 522.2 (1997).

72. See *id.* §521.2(a).

73. See 29 U.S.C. § 214(a)(b) (1994).

receiving instruction in an accredited school, college, or university and is employed on a part-time basis pursuant to a vocational program authorized by a recognized educational body.⁷⁴ This may, or may not, be true of an intern. Violations of the FLSA by employers are sanctioned typically by double damages, doubling the unpaid amount owed by the employer to that employee and sometimes to all the other employees in the same situation, plus court costs and legal fees.⁷⁵

Criteria have been established that employers must meet to be exempt from paying student interns the minimum wage. Each of several factors must be met in order to exempt the intern as a non-employee not subject to the FLSA. The courts consider the following factors relevant but not dispositive: 1) the interns must not displace regular employees, and several interns part-time can not perform the work of a worker displaced thereby; 2) the business cannot obtain any "immediate advantage" from the internship program; 3) the interns cannot be trained to perform specific jobs within the organization, as opposed to more general educational experience; 4) whether interns are guaranteed a job at the end of the internship; and, 5) the actual understanding of the parties concerning whether an internship will be compensated.⁷⁶ The two most important criteria are that the employer "derives no immediate advantage from the activities of the trainees or students," and that interns "do not displace regular employees."⁷⁷ If the internship primarily benefits the intern and has a sufficient nexus to the intern's education, it is not likely to be deemed an employment relationship for which wages must be paid.⁷⁸ On the other hand, if the intern is used to perform the work of regular employees, or, if an employer uses the unpaid internship to provide on-the-job training for the future of its own employees, this violates the Fair Labor Standards Act and the intern will be regarded as an employee within the meaning of the Act.

Mere exposure to a work environment is not enough to justify not paying an intern. If an intern does the work of a regular employee, and displaces an employee, that is not lawfully countenanced, because the intern is providing free labor.⁷⁹ The professed willingness of an individual intern to work for free is

74. See 29 C.F.R. § 520.2(a) (1997).

75. See 29 U.S.C. § 214(b) (1994).

76. See *id.* §§ 214(b), 216(b) (1994).

77. Jennifer Vanderbes, *Unpaid Internships: Free, Useful and Often Illegal*, PITTSBURGH POST-GAZETTE, Aug. 19, 1996, at C1.

78. See McDonald, *supra* note 66, at D1.

79. See Vanderbes, *supra* note 77, at C1.

probably irrelevant. Interns willing to work for free, or for academic credit in lieu of paid compensation, may nevertheless be employees subject to the FLSA, although in the latter case, the academic credit granted usually militates in favor of finding the intern is not a statutory employee. These concerns have led to "intern contracts," whereby some businesses "have even started requiring interns to sign contracts specifying that they will accept a small stipend or college credit in lieu of the minimum wage."⁸⁰

The Director of the United States Department of Labor's Wage and Hour Division in Pittsburgh stated that of 800 labor investigations recently conducted in 24 counties in Western Pennsylvania, 80 percent of the employers were found in violation of the Fair Labor Standards Act.⁸¹

In 1995, one of Atlanta's highest profile public relations firms, A. Brown-Olmstead Associates, was investigated by the United States Department of Labor for exploiting its intern program as a source of free labor.⁸² The firm reached a settlement with the Department of Labor, and admitted that it billed clients for unpaid intern work, agreeing to pay a total of \$31,520 in back pay to forty-two former interns who worked for the firm between October, 1992 and October, 1994. Two of fifty-four interns were still in school when they were working for the firm. The other fifty-two all had college degrees, and some had professional experience in public relations.

Exploitation of college students appears structurally imbedded. Thus, graduate students have become a huge pool of cheap labor for university employers; indeed, even graduated medical doctor "interns" are subjected to some of the most abusive working conditions and poor salaries. It is to the predicament of these aspiring elites that this article now turns.

V. UNIONIZATION INITIATIVES

A. *Yale University Graduate Teaching Assistants*

There are approximately 2,500 graduate students at Yale.⁸³ Teaching assistants attend undergraduate lectures, conduct discussion groups and correct and grade undergraduate course work. They conduct reviews, proctor exams, and grade final

80. O'Connor, *supra* note 48, at 78.

81. *See id.*

82. *See* Eleena de Lisser, *Firm in Atlanta Settles Dispute Over Interns*, WALL ST. J., Mar. 1, 1995, at S1; O'Connor, *supra* note 48, at 78.

83. *See* Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *4 (N.L.R.B. Aug. 6, 1997); *see also* Courtney Leatherman, *Judge Explains Ruling In Yale Union Dispute*, CHRON. HIGHER ED., Sept. 5, 1997, at A19.

papers. Teaching fellows also write recommendations for their undergraduate students. The material they teach is generally more basic than the work they are doing for their doctorates.⁸⁴ They are paid \$5,000 per semester and receive no benefits.

At Yale, full time faculty teach only one-third of the undergraduate courses; graduate students and adjunct faculty teach the rest.⁸⁵ Though graduate students are loosely supervised in their first year of teaching, after teaching ten courses over three years they generally become highly experienced professionals. However, rather than admit this, Yale claims teaching assistants only do three percent of the university's teaching, and thus justifies paying marginal wages. According to a report by Yale graduate assistants, teaching assistants in the humanities and social sciences spent 864 hours in the classroom each week, while full time faculty spent only 756.5 hours.⁸⁶ Although Yale officials claim that teaching assistants are guided and supervised by faculty members, one TA has said that "no faculty member has ever visited [her] class" and "there is no formal teacher training in [her] department."⁸⁷

In 1995, an election was held by the League of Women Voters in which a majority of students voted in favor of gaining union representation.⁸⁸ However, Yale refused to recognize the union, the Graduate Employees and Students Organization ("GESO"). The university administration claimed that the relationship between the teaching assistants and the university was not one of employment.⁸⁹

On December 7, 1995, approximately 400 teaching assistants voted to withhold grades.⁹⁰ They demanded higher pay, health benefits, and better working conditions. The teaching assistants continued to conduct their group discussion sections, proctored exams, corrected and graded exams, and even recorded grades

84. See Yale Univ., 1997 N.L.R.B. LEXIS 619, at *8. For example, a law student with an undergraduate major in history teaching in the history department is not likely to gain legal educational progress, while the University is clearly gaining a major resource.

85. See NELSON, *supra* note 4, at 200.

86. See Michael Berube, *The Blessed of the Earth*, SOC. TEXT, Winter 1996, at 75, 95 n.8.

87. *Id.* at 85 (quoting Emily Eakin, *Walking the Line*, LINGUA FRANCA, Mar.-Apr. 1996, at 52, 60).

88. See *Yale Teachers' Union Votes for Grade Strike*, HARTFORD COURANT, Dec. 8, 1995, at B11.

89. See Berube, *supra* note 86, at 85; see also St. Clare's Hosp. & Health Ctr., 229 N.L.R.B. 1000 (1977).

90. See Diane Lewis, *Assistants at Yale Seek to Organize*, BOSTON GLOBE, Dec. 9, 1995, at 68.

onto grade sheets. After the announcement of the strike, the dean of the graduate school wrote to all of the graduate students and threatened serious consequences, such as withdrawing teaching assignments.⁹¹ The grade strike collapsed on January 14, 1996, when the grade sheets were turned over to the Registrar after the university threatened to terminate the teaching positions of assistants who withheld grades. Yale fired several assistants.⁹²

The underlying need for unionization is based on the need for recognition of the contributions of graduate student to undergraduate education, appropriate compensation for the hours actually required to perform their teaching duties, increased funding for training, and affordable health care.

The NLRB issued a complaint charging Yale with illegally threatening graduate assistants who went on strike after the university refused to recognize their request for a union.⁹³

In the past, the National Labor Relations Board has treated graduate teaching assistants as students rather than employees.⁹⁴ The initial decision to represent the GESO was a sharp reversal of NLRB policy. Private universities have thus far been free to refuse to negotiate with graduate student organizations, and could punish graduate students who are not protected from employer retaliation under the National Labor Relations Act.

According to the GESO, Yale is using teaching assistants, rather than full-time faculty members, due to financial pressures, and should therefore bargain over wages and benefits. The average stipend for a teaching assistant is \$5,000 a semester, whereas a Yale full professor earns an annual average salary of \$90,000.⁹⁵

While the NLRB does not have jurisdiction over public state universities, Yale, as a private employer, is governed by the NLRA.⁹⁶ In 1972, in *Adelphi University*,⁹⁷ the NLRB held that graduate assistants were "graduate students working toward their own advanced academic degree, and that their employment

91. See Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *4 (N.L.R.B. Aug. 6, 1997).

92. See *Labor Board Warns Yale to Negotiate*, WASH. POST, Nov. 20, 1996, at A4.

93. See Diane Lewis, *Complaint Issued Against Yale*, BOSTON GLOBE, Feb. 1, 1997, at F1.

94. See Steven Greenhouse, *Labor Board Plans A Suit Against Yale*, N.Y. TIMES, Nov. 19, 1996, at B6.

95. See *id.*

96. See Glenn A. Duhl, *A Graduate Student Union at Yale?*, CONN. LAW TRIB., Dec. 2, 1996, at Commentary 21.

97. 195 N.L.R.B. 639 (1972).

depend[ed] entirely on their continued status as such.”⁹⁸ The decision focused on the students’ primary interest in acquiring an education and deemed the teaching to be incidental since it was “guided, instructed, assisted and corrected.”⁹⁹ In 1974, in *Leland Stanford Junior University*,¹⁰⁰ the NLRB refused to assert jurisdiction over graduate research assistants, finding them to be students, not employees.¹⁰¹

On August 11, 1997, Administrative Law Judge Michael O. Miller dismissed the complaint issued on January 11, 1997, by the Regional Director of Region 34 of the National Labor Relations Board on behalf of the teaching assistants at Yale University. The decision did not address whether the graduate students were employees, and found that the grade strike was “neither strike nor work” and was therefore not §7 protected activity within the meaning of the National Labor Relations Act. This decision will now be reviewed by the National Labor Relations Board in Washington, D.C. The decision will be subject to review in the U.S. Court of Appeals for the 2nd Circuit and eventually by the U.S. Supreme Court.¹⁰² If Yale loses, the union would be entitled to conduct an election to determine if a majority of the graduate assistants wanted to unionize. If that effort is eventually successful, Yale would be obligated to bargain in good faith with union representatives over the terms and conditions of employment. If the teaching assistants win their case and are deemed employees of the university they will achieve NLRA protections as “employees.”

According to the graduate school dean, Thomas Appelquist, “graduate students are here as students” and working as a teaching assistant “is a kind of apprenticeship.”¹⁰³ The logic of apprenticeship is that graduate students are in training to become professors. However, the reality of the market is that there is no guarantee that these apprentices will ever get jobs. Therefore, the fundamental principle of apprenticeship often is pernicious and unworkable myth, and graduate students are merely exploited labor.¹⁰⁴ Full time academic tenure-track positions upon graduation as for Ph.D.s are the exception rather than the norm in today’s economy, and an “apprenticeship with

98. *Id.* at 640.

99. *Id.*

100. 214 N.L.R.B. 621 (1972).

101. *See id.* at 623.

102. *See* Duhl, *supra* note 96, at Commentary 21.

103. *Grad Students Plan Walkout to Seek Recognition as a Union*, N.Y. TIMES, Apr. 2, 1995, at 42.

104. *See* NELSON, *supra* note 4, at 169.

no future is servitude."¹⁰⁵ Apprenticeships historically are premised as a contract as well as a particular economic and social status. The master provided room and board and training. In exchange, the apprentice would work for the master. If the apprentice tried to leave, he could be legally forced to return.¹⁰⁶ This system does not apply to contemporary graduate assistants.

Instead, most teaching assistants are highly educated doctoral students, entrusted with teaching college undergraduates, but earning only very low wages. Some ask for a "living wage," and a modicum of respect, and job security. According to the Yale GSEO, one-third of all class hours are taught by TAs and another third by adjunct part-time faculty.¹⁰⁷ The GSEO believes that the administration will not recognize the union, for fear of them publicly acknowledging these exploitative situations. As a result of universities' reliance on part-time faculty and downsizing by attrition of tenured positions, many teaching assistants will graduate into "lower-paying, non-tenure-track teaching positions that have little or no benefits or job security."¹⁰⁸

B. Organization Efforts at Other Universities

The 1960s witnessed tremendous growth in public employee unionism and in professional unionism.¹⁰⁹ Today, despite the notorious *Yeshiva University* decision in 1980, almost one quarter of full time faculty are organized into unions.¹¹⁰ Teaching assistants who perform similar duties should be organized as well. Unfortunately, many administrators view graduate students as apprentices in order to justify the wages that they are paid, while faculty members do the same to avoid acknowledging the inherent exploitation of their graduate students.¹¹¹

In the 1960s, graduate assistants at the University of Wisconsin formed the Teaching Assistants Association (TAA). According to the University of Wisconsin administration, TAs did not receive salaries, but grants and the TAs duties were a part of their academic program as students who were "professors in training."¹¹² They prepared lessons and provided undergraduates

105. *Id.* at 172.

106. See Duncan Kennedy, *Boola!*, SOC. TEXT, Winter 1996, at 31, 34.

107. See Debbie Goldberg, *When Students Teach Students*, WASH. POST, Apr. 7, 1996, at R12.

108. *Id.*

109. Stanley Aronowitz, *Academic Unionism and the Future of Higher Education*, in WILL TEACH FOR FOOD, *supra* note 6, at 182, 182.

110. See *id.* at 204.

111. See *id.* at 235.

112. *Id.* at 185.

with academic counseling. The decline of full time teaching positions began in the late 1960's. After a strike, the administration recognized the TAA and even negotiated a contract.¹¹³ In 1980, the United Faculty of Florida was recognized as the collective bargaining representative of graduate research and teaching assistants in Florida.

At the University of Michigan, approximately 1,800 graduate assistants are considered employees and have been unionized since 1973.¹¹⁴ Teaching assistants pay no tuition, and get free health insurance, yet their salaries are not significantly higher than at other schools. However, the grievance procedure aids graduate assistants' initiative to be taken seriously as professionals, when, for example, they complain about working more hours than they were hired for, or for having too many students in a section. TAs at the University of Kansas voted to unionize in April 1995, while some graduate and undergraduate tutors and graders won the right of collective bargaining at the University of California, San Diego in October, 1996.¹¹⁵

Thus, there are recognized graduate student unions at the University of California at Berkeley, University of Florida, University of South Florida, University of Kansas, University of Iowa, University of Massachusetts at Amherst, University of Massachusetts at Lowell, University of Michigan, Rutgers University, State University of New York, University of Oregon at Eugene, University of Wisconsin at Milwaukee and the University of Wisconsin at Madison.¹¹⁶ The Yale University situation presents the direct challenge to federal labor relations law: will the NLRB extend protections of the NLRA to graduate teaching assistants at Yale, one of the nation's premier private universities?

C. *Medical Residents, Interns and Fellows*

The NLRB considers as students, not NLRA employees, residents and interns — medical school graduates — working and receiving medical training in hospitals. Residents perform essentially the same work as licensed physicians, often without supervision. They are paid annual stipends and may receive benefits like vacation and holidays.¹¹⁷

113. See *id.* at 187.

114. See Goldberg, *supra* note 107, at R12.

115. See Dennis Kelly, *Grad Students Fight Class Struggle*, USA TODAY, Jan. 2, 1996, at 1D.

116. See Kathy M. Newman, *Poor, Hungry and Desperate? Or Privileged, Histrionic and Demanding?: In Search of the True Meaning of "Ph.D."*, SOC. TEXT, Winter 1996, at 97, 129 n.10.

117. See Duhl, *supra* note 96, at Commentary 21.

Officials at Howard University Hospital maintained that interns and residents are students, rather than employees, and refused to negotiate with the Committee of Interns and Residents who went on strike.¹¹⁸ The residents noted that, in comparison to other hospitals, their salaries were several thousands of dollars lower, while they were on call more often. One resident stated that "Without a union contract, residents are like 'indentured workers.'"¹¹⁹

In California, a 1978 state statute, which authorized collective bargaining by other university professionals, was expanded to include residents and interns.¹²⁰ The California Supreme Court reasoned that residents are employees because they spend most of their time working on patients without help from physicians and incidentally attend some classes for which they do not receive grades or pay tuition.¹²¹

In Florida, doctors are seeking to organize against managed care's assault on their incomes and working conditions. The residents, interns, and fellows of the Dade County Public Health Trust voted in favor of joining the nation's oldest and largest house staff union, the Committee of Interns and Residents (CIR).¹²² The Florida Public Employees Relations Council, which oversees collective bargaining issues involving public employees, must approve any unionization effort.¹²³ By allowing the vote to proceed, the PERC determined that the house staff members were not students, but employees.¹²⁴ Not unlike the situation of graduate assistants, there is a great deal of uncertainty and instability in the workplace for physicians because of current health care systems. Some independent doctors have sought to present themselves as employees of managed-care organizations, which sometimes control the number of patients they see and the amount of money they earn.¹²⁵

There are currently eight physicians' unions representing approximately 20,000 doctors, most of whom are residents and

118. See D'Vera Cohn, *Interns Vote to Strike at Howard U.: Young Physicians Seek Recognition for Union*, WASH. POST, Apr. 3, 1996, at A12.

119. *Id.*

120. See *Regents of the Univ. of Cal. v. Public Employment Relations Bd.*, 715 P.2d 590 (Cal. 1986).

121. See *id.* at 601-03.

122. See Twig Mowatt, *Cutbacks Prompt South Florida Physicians to Organize*, PALM BEACH DAILY BUS. REV., Dec. 12, 1996, at A1.

123. See *id.*

124. See *id.*

125. See *id.*

interns.¹²⁶ However, independent doctors may not qualify as employees for collective bargaining if they are deemed to be "supervisors" or "managers." If doctors are able to argue successfully that HMOs control physicians' actions, then they may be viewed more realistically as employees for the purposes of collective bargaining.¹²⁷ The NLRB has certified a group of physicians for collective bargaining in Arizona.¹²⁸

Nothing in the NLRA prohibits a hospital employer from recognizing a union of residents and interns.¹²⁹ The issue of whether residents, interns, and fellows are employees under the NLRA has been raised in current litigation at the Boston Medical Center Hospital. Precedents set in the 1970s, such as *Cedars-Sinai Medical Center*, and *St. Clare's Hospital and Health Center*, have held that interns are students.¹³⁰ The Boston case is a test case that will challenge these decisions. The interns have a contract and have been recognized as a collective bargaining entity.¹³¹ However, since the privatization of Boston Hospital in 1996, officials have refused to recognize the union.¹³² The CIR has also filed a petition on behalf of interns at Maimonides Hospital in Brooklyn, New York, but the decision has been deferred until the Boston Hospital case is resolved.¹³³ Much depends on the outcome of the on-going unionization initiative of the residents and interns at Boston Hospital.

VI. PRAGMATIC AND MORAL DIMENSIONS: THE APARTHEID DISINVESTMENT ANALOGY

On September 26, 1986, President Reagan vetoed a bill that would have imposed economic sanctions on South Africa. President Reagan's reason for vetoing the bill was that the main victims of the bill's economic sanctions would be South African Blacks.¹³⁴ Congress overrode the President's veto.¹³⁵ In many ways, the labor and employment law regime has a similar practi-

126. See Darryl Van Duch, *Employed Physicians Unionizing*, NAT'L L.J., July 21, 1997, at 1.

127. See *id.*

128. See *id.*

129. Interview with Lauren Esposito, Associate Attorney, of Kennedy, Schwartz & Cure, P.C., in New York, N.Y. (Aug. 14, 1997).

130. See *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).

131. Interview with Lauren Esposito, *supra* note 129.

132. *Id.*

133. *Id.*

134. See Jeff Walker, Recent Developments, 28 HARV. INT'L L.J. 117, 118 (1987).

135. See *id.* at 119.

cal and moral tension regarding student interns. On the one hand, in the very competitive employment market, students desperately need to distinguish themselves to prospective employers. The normal pools of competition are now increased by the welfare workfare populations, and by the public sector workers whom the workfare armies threaten eventually to largely displace. On the other hand, inability to regulate effectively those employers who exploit the free labor of student interns presents a moral quandary. Regulation itself may deprive student interns of considerable opportunities, and diminish individual prospects for employment.

The Anti-Apartheid Act of 1986 restricted various financial activities of American nationals doing business in South Africa. The Act prohibited United States nationals from making or approving any extension of credit to the South African government, or to any organization controlled by the South African government.¹³⁶ Even so, the restriction did not forbid loans for any educational, housing, or humanitarian benefit available to all South Africans on a nondiscriminatory basis.¹³⁷ The Act prohibited new investments in South Africa by any United States national.¹³⁸ Third, the Act prohibited any United States depository institution from accepting or holding any deposits from the South African government or any agency controlled by the South African government,¹³⁹ and instructed the United States Export-Import Bank to encourage South African blacks to use its banks and to encourage credit to businesses majority-owned by black South Africans or other nonwhite South Africans.¹⁴⁰ The Act provided funds to support black South African students.¹⁴¹ The Act prohibited the export of numerous goods to South Africa,¹⁴² and prohibited the importation of a number of South African goods into the United States.¹⁴³

The main argument for sanctions was a moral one. Apartheid is a moral evil and the United States decided, ultimately, not to provide support for the racist South African regime.¹⁴⁴

136. *See id.*

137. *See id.*

138. *See id.* at 119-20.

139. *See id.* at 120.

140. *See id.*

141. *See id.* at 121.

142. *See id.* at 120.

143. *See id.*

144. *See Amy Wilentz, Not a Black and White Issue: Congress is Caught in the Tide for South African Sanctions, TIME, June 17, 1985, at 32, 32.*

Apart from whether economic sanctions were ultimately successful, the counter-argument was that the sanctions hurt the very people they hoped to protect. Many businesses in the United States contributed significantly to the racial and social stability of South Africa by repudiating Apartheid in their South African facilities, implementing the "Sullivan Principles," and taking affirmative steps to increase opportunities for black workers.¹⁴⁵ The "Sullivan Principles" were a code of conduct intended to promote equal opportunity in employment practices by companies operating in South Africa.¹⁴⁶ Specifically, the Sullivan plan provided for equal treatment in hiring, pay and promotions, and committed employers to improving workers' living conditions.¹⁴⁷ Most United States' firms doing business in South Africa adopted and supported the Sullivan principles.¹⁴⁸ Many businesses left South Africa because of the legal sanctions, or because of pressure to do so by the American public.¹⁴⁹

Decisions to leave and divest were not cost-free, however, and often resulted in the loss of non-discriminatory workplaces for black South Africans, and of corporate funding for many educational and social programs.¹⁵⁰ For example, Ford Motor Company trained black apprentices for skilled jobs that at the time were "reserved" by law for whites.¹⁵¹ When businesses were forced out of South Africa, they did not shut down the facilities, but sold them to other investors.¹⁵² The Germans, French, and Japanese corporate buyers were not as anti-Apartheid as American companies.¹⁵³ When U.S.-based businesses left, the result was the indirect strengthening of apartheid, as other multinational corporations filled eagerly the vacuum created by U.S.-based divestment.¹⁵⁴

Until recently, the prevailing view among white South Africans was that the sanctions hurt blacks, because the sanctions resulted in mass unemployment for black South African work-

145. See Jose I. Fernandez, Note, *Dismantling Apartheid: Counterproductive Effects of Continuing Economic Sanctions*, 22 LAW & POL'Y INT'L BUS. 571, 573 (1991).

146. See *id.* at 601 n.4.

147. See William R. Doener, *Pullout Parade: More and More U.S. Firms Withdraw*, TIME, Nov. 3, 1986, at 32, 33.

148. See *id.* at 34.

149. See Fernandez, *supra* note 145, at 573.

150. See *id.*

151. See George Church, *Apartheid's New Upheaval: As Black Townships Simmer, Divestiture Divides the U.S.*, TIME, July 22, 1985, at 34, 34.

152. See *id.*

153. See *id.*

154. See *id.*

ers.¹⁵⁵ In a poll by *Business Week*, in 1985, 61% believed that it would be "against the interests" of black employees if U.S. companies ceased operations and divested from South Africa.¹⁵⁶ There are 22 million black people in South Africa.¹⁵⁷ Gatsha Buthelezi, the leader of the 6 million Zulu tribespeople, stated that if there were any downturn of the economy because of anti-Apartheid divestment sanctions, it would be the black population of the country who would suffer most.¹⁵⁸ One western diplomat described divestiture as a "plan to starve the blacks until the whites surrender."¹⁵⁹

Sanctions resulted in the loss of jobs for 65,000 black workers, 1% of South Africa's labor force.¹⁶⁰ An increase in unemployment was also attributed to the expulsion of one million illegal foreign blacks who worked in South Africa.¹⁶¹ Since South Africa also was a major contributor to the economic stability of its neighboring states, economic problems in South Africa due to divestment temporarily hurt South Africa's neighbors' economic growth.¹⁶²

Anti-Apartheid divestiture posed an interesting dilemma for the United States. On the one hand, the United States repudiated apartheid racial discrimination. On the other hand, the divestment of American businesses undeniably may hurt the very people the United States endeavored most to protect, resulting in severe unemployment for black laborers.

A decade later, the analogous tensions along the pragmatic and moral continuum are present in the dynamic of student intern labor. Will stronger regulation of employers deprive the students of necessary experiential and skills-enhancing opportunities? Will the absence of effective regulation exacerbate the exploitation of student interns, and accelerate the vicious "race-to-the-bottom?"

VII. CONSUMER BOYCOTTS

There is little likelihood that the pandemic exploitation of labor will be significantly ameliorated, let alone eradicated, in the foreseeable future. While the exploitation of labor may not

155. See Fernandez, *supra* note 145, at 578.

156. Stuart Jackson, *Fight Apartheid, But Don't Close Up Shop*, BUS. WEEK, Feb. 11, 1985, at 38.

157. See Church, *supra* note 151, at 34.

158. See Wilentz, *supra* note 144, at 32.

159. *Id.*

160. See *id.*

161. See *id.*

162. See *id.*

be broken, however, through largely ineffective, transnational, legal regimes, there are some occasional signs that some of the most egregious abuses may be stemmed primarily through voluntary, collective, consumer actions directed against exploitative child labor.

For example, in London, in November, 1996, the World Federation of Sporting Goods Industries — which includes Nike, Reebok, and Adidas — set a February 14, 1997 deadline to agree to a code of conduct to end the abuse of child labor in low-wage Asian factories, with standards to be set by the International Labor Organization.¹⁶³ With a \$75,000 grant from the Ford Foundation, the American Fair Trade Association published a directory of North American fair trade associations and stores, entitled “Sweatshops or Fair Trade?: Now You Have a Choice!”¹⁶⁴ In Singapore, the World Trade Organization’s¹⁶⁵ members renewed their professed commitment to support decent working conditions and “agreed to uphold internationally reorganized core labor standards, including the right to form unions. They also agreed not to exploit child labor.”¹⁶⁶ Oxfam, Christian Aid, and UNICEF are among the international organizations bringing moral persuasion to bear on these problems, and spurring these reforms. In the United States, Serv International and Ten Thousand Villages, based in New Windsor, Maryland, and Akron, Pennsylvania, respectively, and affiliated with the Mennonite Church, have coordinated the import and export of goods from about fifty nations where employers are committed to humane labor principles.¹⁶⁷ The total annual sales coordinated by these two United States-based organizations are about \$17.5 million, accounting for half of all fair trade products annually in the United States; the Western European and Australian annual fair trade volume is about \$500 million annually.¹⁶⁸ Oxfam and its affiliates are urging Western European groceries and clothing stores to carry fair-traded food and clothing. Europeans annually consume about 12,000 tons of fair-traded coffee; Equal Exchange, based in Carton, Massachusetts, the largest coffee fair-trade organization in the United States, buying coffee from farmers’ cooperatives in Latin America, reports its annual sales vol-

163. See Paul Lewis, *Amid New Wealth of Trade, a Humanizing Movement*, N.Y. TIMES, Dec. 25, 1996, at D3.

164. *Id.*

165. *See id.*

166. *Id.*

167. *See id.*

168. *See id.*

ume of \$3.5 million in the \$7 billion coffee world market has doubled since 1994.¹⁶⁹

In the United States, in what has been described as a "children's crusade," school children have utilized e-mail, cyberspace website technology, letter writing campaigns to elected officials and to corporate executives,¹⁷⁰ and leafleting consumers at shopping malls, to protest corporate use of child labor by United States' headquartered multinational corporations beyond the United States. Thus far, while the tangible results have been modest, the corporate embarrassment from the heightened public consciousness has been considerable.

While Disney and Guess deny that they use child labor this crusade, teachers and parents say, is largely a grass-roots phenomenon, with children usually plunging in after receiving E-Mail messages from other students or after reading magazine articles or seeing television programs sharing the conditions of child labor: 10-year-olds in India working 12 hours a day weaving rugs, 13-year-olds in Central America stitching sportswear.

The children's campaign does not single out a particular company or a particular nation, though several of the companies they name are American and all of the labor abuses they cite are overseas.

Occasionally, children enlist in the crusade after a teacher invites a union official into class to inveigh against child labor and sweatshops

.....

The companies coming under criticism praise the school-children for their idealism, but assert that the students often have heard only one side of the story and sometimes have been manipulated by union activists.

Executives at Disney and Guess say they have acted to insure that contractors making their products do not use child labor or violate labor regulations.

.....

The companies that are the students' targets are far more reluctant to criticize children than the companies' union organizers.

169. See Steven Greenhouse, *Child-Labor Issue Ignites a Multifaceted Youthful Crusade*, N.Y. TIMES, Dec. 25, 1996, at B1.

170. See *id.*

At Guess, executives say the union of Needletrades, Industrial and Textile Employees has stirred up students against them, especially at colleges, as part of an effort to unionize California garment workers.

Charles Kernaghan, a labor advocate who exposed sweatshop conditions for clothes made by Kathie Lee Gifford and the Gap, said, 'Companies are fairly adept at dealing with unions. They can just say 'its just those big labor bosses again.' But when it comes to children asking questions, they have a harder time. Children are harder to discredit.'

Many children have written to Disney after contacting Mr. Kernaghan to ask about his allegations that Disney contractors pay Haitian workers 6 cents for each Pocahontas or Hunchback garment, which the company then sells for \$19.99.

Ken Green, a Disney spokesman, said his company pays its Haitian workers about 50 cents an hour when the minimum wage is 28 cents. He said the company seeks to insure its contractors abide by minimum wage laws and other rules in whatever countries they operate.¹⁷¹

The Clinton Administration has also offered support, and has endeavored to achieve a World Trade Organization declaration supporting worker rights to form unions and to prohibit most child labor.¹⁷² In April, 1997, leading representatives of the U.S. apparel industry reached an agreement with labor and human rights groups to end sweatshop conditions around the

171. *Id.*; see also John Tagliabue, *Europe Fights Child Labor in Rug Making*, N.Y. TIMES, Nov. 19, 1996, at D9. Veillon, one of Switzerland's largest mail order houses, screens all Oriental rugs it sells to insure they are manufactured in compliance with humane labor conditions. See *id.* The International Labor Organization, coordinating with Veillon, conducted an inspection of 200,000 to 600,000 workers at 100 carpet work sites in India. See *id.* "Veillon demanded to know the addresses of manufacturing sites, and the right to visit them unannounced; Veillon required assurances that laborers were not forced to work, that they suffered no injury from the work, and that they were able to leave the workshop premises when their day's labor was done." *Id.* In 1995, several Swiss rug retailers and charitable foundations established the Foundation for a Just Trade in Oriental Rugs; in Germany, the Rugmark labeling plans insure that the rugs are not the product of child labor. See *id.*

172. See Helene Cooper, *White House Seeks to Link Labor Rights, World Trade to Gain Union Support*, WALL ST. J., Dec. 10, 1996, at A24; Steven Lee Myers, *Clothing Makers Taking Steps to Limit Child Labor Abroad*, N.Y. TIMES, Oct. 21, 1996, at A10.

world.¹⁷³ Under the accord, independent monitors would inspect factories worldwide.¹⁷⁴ The rule of a 60 hour maximum work week was approved, except in countries that legally set the workweek at less than 60 hours, or where workers genuinely volunteered to work longer hours.¹⁷⁵ The panel agreed that factories should pay the legal minimum wage where the factory is located and should consider whether wages are enough to meet workers' basic needs.¹⁷⁶ The code also includes provisions against physical, sexual or verbal abuse by superiors.¹⁷⁷ The agreement bars the use of prison and other forced labor and prohibits the employment of children under age 15 in most countries.¹⁷⁸ It recognizes collective bargaining and seeks either the minimum wage or the prevailing industry wage, whichever is higher.¹⁷⁹ However, critics believe a "living wage" is necessary.¹⁸⁰

Nike Inc. is among the manufacturers purportedly committed to reform. Andrew Young, former U.S. ambassador to the United Nations, reviewed the treatment of workers in Nike's Asian factories in June 1997. He found that 12 sites in Vietnam, Indonesia and China were clean and modern and unlike "what most Americans would call 'sweatshops.'"¹⁸¹ Young found only that plant managers rarely spoke the local language fluently and recommended a better grievance system.¹⁸² As for wages, Young said "it is not reasonable to argue that any particular U.S. company should be forced to pay U.S. wages abroad while its direct competitors do not."¹⁸³ Whether these major multinational corporations are genuinely committed to reform remains to be seen, apart from continuing moral suasion by workers' rights activists.

VIII. CONCLUSION

Student interns can not be expected to voluntarily forego what they regard as important career-enhancing opportunities.

173. See Paul Blustein, *Apparel Industry Reaches Agreement to End Sweatshops in U.S. and Abroad*, WASH. POST, Apr. 10, 1997, at A19.

174. See *id.*

175. See *id.*

176. See *id.*

177. See *id.*

178. See William Branigin, *Clinton, Garment Makers Hail Accord on Sweatshops; Critics Say Pact Falls Short on Key Work Issues*, WASH. POST, Apr. 15, 1997, at A10.

179. See *id.*

180. See *id.*

181. Caryle Murphy, *Nike Pulls Shoes That Irked Muslims*, WASH. POST, June 25, 1997, at C13.

182. See *id.*

183. *Id.*

Public consciousness is barely embryonic regarding the most egregious abusive child labor exploitation. Prospective elites — in the form of ambitious students — are hardly a likely empathetic subject of public consciousness raising, given the host of other, more pressing and immediate problems afflicting the rapidly transmogrifying world of work. Therefore, meticulous enforcement of existing statutory protections of student interns is all the more important to prevent student intern exploitation.

The effects on the quality of public sector services promise, in the long term, to deteriorate. Workers with no rights, effectively making less than minimum wage, have little recourse to privatized public sector services. Demoralized, desperate bed-fellows may be the rapidly growing number of downsized, unemployed former white-collar workers. White-collar workers found themselves laid off in record numbers for the past two decades. Most are not able to find comparable work, and for the first time, are tasting in significant numbers the unemployment frustrations traditionally associated with the less educated and less skilled.

Non-paid student interns are the junior exploited segment of the aspiring, elite work force. The difficult job market for many graduating students, and their ever increasing tuition and accompanying student loans, have made many students desperate in their search for securing permanent, full-time employment after graduation. Not only does this search often involve students working frequently as interns for no pay, but it also involves the students actually paying thousands of dollars to their schools, while in school, for academic credit for these internships. Unfortunately, colleges often have been complicit with this scam: the school gets paid, not to teach, but simply to put credits on transcripts. The schools are not merely complicit in this exploitation; they often affirmatively urge students to take the path of the unpaid internship for dubious academic credit. Career service offices may especially advise students not at the academic top of their class that finding a paying job will probably be very difficult, and the more viable employment search may first be through the school's internship programs.

Naturally, the schools will conveniently have a list of internship programs where the students can work for someone else for free, while paying the school thousands of dollars in tuition for purported academic credit for this supposed opportunity. It is highly unlikely that this exploitive relationship substantially enhances the marketability of the student. The student would be in an equivalent position if she simply worked for the employer for free, but did not pay tuition for academic credit to the school. Often times, because of time constraints, it is difficult for the stu-

dent to fulfill the required number of credits to graduate and to work concurrently. Hence, the student intern finds herself in the especially unenviable position of having to work for free and also to pay tuition for the internship opportunity and academic credits to/from the school. Ironically, many of these students feel compelled to obtain this internship work experience to distinguish themselves from the pool of graduates. Some universities, knowing the predicament students are in, promote students to take full-time 40 hours a week, nonpaying internship positions, with the school giving the student 15 credits at the end of one semester, upon payment of the full semester tuition.

Clearly, the employers are obtaining an immediate advantage from the work of student interns, and the interns are usually doing the work that another full-time, permanent (and paid!) employee would normally do. This, ironically, adds to the students' employment dilemma. By replacing full-time workers, the student interns find themselves competitively reducing more experienced competition downward and back in the pool of fellow competitor employees looking for work. Students working for free effectively deprive themselves of considerable compensated job opportunities; thus, they collaborate in their own victimization. Employers will continue to have incentives always to obtain new cycles of student interns to work for free, rather than to hire the former intern/new graduate as a permanent employee. Just as with divestment from South Africa, which in many ways hurt blacks initially, it ultimately spurred the end to segregation. While students likewise may suffer from a proposed, albeit unlikely, "boycott" of student internships, in the long run, employers thus boycotted may eventually have to start offering competitive wages and benefits to more (compensated) employees.

The fact that academic credit is granted should not militate in favor of finding that the student intern is not a statutory employee. The students are not receiving anything particularly special from the employer, and the university is not necessarily safeguarding the interests of the students and their education. Administrators of schools may have their own agendas, and the potential for conflict of interest, indeed, abuses, should strictly dictate that students are FLSA statutory employees entitled to wages and to employee benefits, with "intern contracts" recognized as transparent attempts to circumvent the law.

The government has chosen largely to ignore the exploitation of student interns. Obviously, a problem exists when the local Pittsburgh Wage and Hour division's study concerning student interns found that 80 percent of employers were violating

the Fair Labor and Standards Act. If the government does not effectively monitor and regulate, it is highly unlikely that there will be any effective change. There are many reasons. Most college students probably do not know their rights under the law. In any event, one cannot reasonably expect college students to assert their rights unilaterally against a corporation.

The students need the experience, and the employers know it. When jobs are scarce, and students are aggressively seeking every possible way to distinguish themselves, the exploited student interns are in a no-win situation. They can suffer through the experience, performing uncompensated grunt work. The even worse student option may be to report the employer, from whom the student interns are hoping to receive permanent job offers. Reporting the indiscretions of the employers are not likely to endear students to the purportedly prospective employers.

Students are not the only ones who suffer, as permanent workers are indirectly replaced or not hired. While publicity remains muted, workers will continue to be displaced. Therefore, beyond moral arguments against exploiting student workers, there are also pragmatic economic arguments. Displaced workers have to find other jobs, draw on unemployment compensation, and may be reduced to welfare.

Consequently, more effective government regulation needs to be implemented. There are a variety of regulatory mechanisms through which this exploitation can be ameliorated. The first is to educate students regarding their rights before they enter their internships. Each college should develop offices where students can voice their concerns about exploitation/non-compensation, since students are much more likely to report exploitative situations to their school than to the government in the first instance.

The universities themselves need to be more involved in preliminary screening and periodically monitoring the workplaces where the students intern. The schools should continually update and evaluate what the students are doing at work and investigate possible problems. Employers with repeated incidence of exploiting students should be removed as potential internship sites.

Since no one can realistically expect the colleges to do this all unilaterally, the Wage and Hour Division of the United States Department of Labor needs to become much more involved, in frequent preventative contact with the universities to investigate potential problems. Strengthening the regulatory regime is the

most realistic avenue for the foreseeable future to balance all legitimate interests and to protect workers' rights.

Finally, graduate teaching assistants must be recognized as employees. Unlike protests in the 1960s, the current unrest is not about an unpopular war, political correctness or tenured radicals, but about health care and job training.¹⁸⁴ As tenure track faculty opportunities in academia are decreasing, universities continue to admit large numbers of graduate students. University administrations continue to contend speciously and hypocritically that graduate students are apprentices being prepared for tenured positions. Yet, at Yale, until 1990, the apprenticeship program offered no training, no effective grievance procedure and no job placement program.¹⁸⁵

Perhaps due to the somewhat mundane nature of the problems in relation to past unrest, the Yale University administration is dismissing students as "malcontents, unwilling to pay their dues, motivated by self-interest."¹⁸⁶ However, the students of the 1960' had no need to protest working conditions because they knew almost everyone would get a job during the biggest expansion of higher education in American history.¹⁸⁷ Today, students face a very different marketplace pervaded with job insecurity.

For example, according to the Yale administration, there is no need to pay graduate students a "living wage" because a Yale degree assures them of a high paying job.¹⁸⁸ However, Yale is not exempt from the rest of the economy; the graduate assistants are not the "blessed of the earth."¹⁸⁹ They are not dramatically different from graduates of the University of Wisconsin or the University of Michigan, facing an ever more uncertain job market. Relations among teaching assistants and the administration at Yale are not unlike relationships at other universities that require the protections of collective action.

Twenty-five years ago, graduate students may have done little teaching. Today, the numbers of graduate students reflect the teaching needs of the university, rather than the dynamics of the post-Ph.D. job market for tenure-track faculty.¹⁹⁰ When considering whether graduate assistants are students or employees, uni-

184. See Debby Applegate & Bruce Tulgan, *At Yale, a Decent Life is A Radical Idea*, N.Y. TIMES, Jan. 13, 1996, at 23.

185. See *id.*

186. *Id.*

187. See *id.*

188. See Berube, *supra* note 86, at 86.

189. *Id.*

190. See Newman, *supra* note 116, at 102.

versities "hired teaching assistants more for economic reasons than academic ones."¹⁹¹ Graduate students deserve more control over university decisions that affect their lives and work.¹⁹²

What eventually occurs at Yale will have significant influence throughout the private sector economy, far beyond the world of academia. Unionization, under the auspices of the NLRA, will send powerful legal signals militating against worker exploitation. Quite apart from the litigation outcomes, however, the moral suasion and consciousness of workers positively demonstrate that exploited workers need not be powerless. On O'Connell Street, the main avenue in Dublin, Ireland, the statue of the great Irish nationalist labor leader, Joseph Connally, executed for his role in the 1916 Easter Rebellion, bears this inscription: "Sometimes the great appear great only because we are on our knees. Let us rise."

191. *Id.*

192. *See id.* at 102-03. If teaching assistants are recognized as employees they may be eligible for retirement benefits, unemployment compensation, and better formal agreements on working conditions. Teaching assistants should be paid a year's wages for a year's work and if resources are limited, faculty salaries may have to be reconsidered.